Office - Supreme Court, U.S.
FILED
JAN 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1024

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROSE M. SALAZAR,
Petitioner,

vs.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition to Petition

MALCOLM BARRETT,
General Counsel

THOMAS JACKSON,
Associate General Counsel

JAMES W. ROSENQUIST,
Attorney

800 Madison Street
Oakland, California 94607
(415) 465-4100
Attorneys for Respondent.

January 1982

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

QUESTIONS PRESENTED

After reviewing the Petition and the arguments advanced by counsel, it appears that the following issues should be considered by this Court in the event that the Writ is granted:

1. Are the District Court's Findings of Fact sufficient and adequate in resolving the issues raised in this disparate treatment case?

2. In a case claiming national origin discrimination, where the theory of proof is disparate treatment, must the employer's supervisors have actual knowledge of plaintiff's status or is constructive knowledge, based on company records, sufficient to permit an inference that the employer's reasons for discharge were a pretext?

SUBJECT INDEX

	Page
Questions Presented	i
Statement of the Case	1
Reasons Why The Writ Should Be Denied	5
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Pages
McDonnell Douglas Corp. v. Green, (1973) 411 U.S. 792	7, 8
Salazar v. San Francisco Bay Area Rapid Transit District, Docket No. 76-395; Petition denied, 429 U.S. 951 (1976)	2
Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248	7

Statutes and Rules	
42 U.S.C. §§ 2000e	1
Rules of the Supreme Court, Rule 17	5

Miscellaneous	
Schlei and Grossman, Employment Discrimination Law (1976) p. 1158	8

No. 81-1024

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROSE M. SALAZAR,

Petitioner,

vs.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition to Petition

Respondent San Francisco Bay Area Rapid Transit District opposes the granting of the Writ petitioned for herein.

STATEMENT OF THE CASE

This is a single plaintiff employment discrimination case brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*). On March 27, 1972, plaintiff, a woman of Mexican-American national origin, was discharged by defendant, San Francisco Bay Area Rapid Transit District ("BART").[1] She sued, alleging that her

1. BART is a local governmental agency, a rapid transit district established and governed by §§ 28,500, *et. seq.* of the California Public Utilities Code.

discharge was unlawful because it was based on her national origin and sex.[2]

Trial was held in December 1974 and consumed ten days. No direct evidence of discrimination was adduced. Plaintiff's entire case was an attempt to show disparate treatment and thereby rebut BART's direct evidence of the legitimate, non-discriminatory reasons for the decision to fire plaintiff. BART also presented evidence to show either that the instances of claimed disparity did not occur as perceived by the plaintiff or that there were legitimate reasons for the actions which she believed were unfair to her.

The District Court ruled in favor of BART at the conclusion of trial. This was followed by detailed Findings of Fact and Conclusions of Law (Appendix B to the Petition), and judgment was entered in January 1975.

After a protracted delay,[3] the plaintiff's appeal was heard by the United States Court of Appeals for the Ninth Circuit, which issued a Memorandum opinion (Appendix A to the Petition) affirming the District Court.

Plaintiff was hired by BART in March 1971 as a PBX Operator-Receptionist. She was fired a year later for being absent from work, in violation of explicit instructions, as well as for her prior history of poor performance, including her record of absences and her inability to get along with her supervisors and co-workers. (Finding of Fact No. 13).

---

2. Although the complaint contained other allegations of discriminatory treatment, those claims were not cognizable under Title VII. The amendments to the Equal Employment Opportunity Act of 1972, 86 Stat. 103, which made Title VII applicable to public employers, were not effective until March 24, 1972.

3. This case was previously before this Court on a Petition for Certiorari filed by BART to obtain review of a procedural issue relating to the timeliness of the filing of the notice of appeal. *Salazar v. San Francisco Bay Area Rapid Transit District*, Docket No. 76-395; Petition denied, 429 U.S. 951 (1976).

Plaintiff's mechanical proficiency with the switchboard was not a question in this case. Rather, it was the plaintiff's personality and attitude which created problems. The following excerpt from a trial exhibit was cited by the trial court as a reasonably accurate description of plaintiff's work history and attitudes at BART:

> "Almost from her date of hire in March of 1971, Salazar has found it fashionable to ignore the directives of management in terms of following generally accepted and explicitly stated lines of authority and communication. It has been documented and can be shown that despite numerous warnings from her immediate supervisor and Department Head to present her problems and questions in a logical manner and along established lines of departmental authority prior to seeking the assistance of outside employees within the District, that Salazar has constantly refused to follow acceptable procedures. She has in a very short period of service succeeded in alienating an unbelieveably high percentage of District management representatives and fellow employees. As evidenced by the employee's list of grievances as contained in the preceeding 'STATEMENT OF THE CASE' very little occurs in or around Salazar which she does not feel compelled to resist, debate and complain about."

The trial record showed numerous manifestations of plaintiff's abrasive and insubordinate personality. For example, there was evidence of a high rate of absenteeism and of taking excessively long breaks. Plaintiff complained at length about the procedures, equipment and scheduling at the switchboard, seeking to substitute her judgment for her supervisor's and, in one instance, for the telephone company's. The record reveals instances, between plaintiff and her co-workers, of bickering, threats and, according to plaintiff, an assault. Plaintiff's poor performance led to

poor formal evaluations and to denial of a salary increase. (Finding of Fact No. 8). She frequently was counseled and was warned of disciplinary action or discharge on several occasions. (Findings of Fact No. 7 and 9).

Of course, plaintiff's version of her work record differed from that of her supervisor. In fact, the record in this case reveals that in almost every instance where plaintiff interacted with her supervisor, the plaintiff had a different recollection or perception of the event. She testified, for example, that on the day she was hired she was promised an automatic salary increase. Her supervisor denied that any such promise was ever made to plaintiff or to any other employee. On her last day of employment, she was told she would be fired if she left work. She denied being so informed. These incidents are not isolated examples. They are merely the first and last in the chronology.

The issue of credibility was also important in connection with the evidence regarding her supervisors' lack of knowledge that plaintiff was a Mexican-American. Plaintiff's immediate supervisor and the department head to whom he reported testified that they did not know her national origin. Other management employees with whom plaintiff had contact did not know that plaintiff was Mexican-American, and there was evidence that plaintiff told a co-worker she was white. In addition, the record is very clear that plaintiff was not identifiable through some physical characteristic as Mexican-American.[4]

Facts relevant to the issue of disparate treatment were also controverted. For example, plaintiff claimed to have applied for six other jobs at BART, and she assigned

---

4. The EEOC investigator testified that he could not determine plaintiff's ethnicity if he saw her on the street, that she spoke English well and looked more Irish than Mexican-American.

discrimination as the reason for the rejections. The evidence showed, however, that four of the jobs were not even available and that better qualified persons were hired for the other two.

The District Court had the opportunity to see and hear the witnesses and to evaluate their candor. Its resolution of the hotly contested facts is set forth in detail in the findings.

REASONS WHY THE WRIT SHOULD BE DENIED

Despite the legal issues which the Petition seeks to raise, it appears to us that Petitioner's real purpose is to have yet another tribunal review the factual issues which were decided against her. We would not be reluctant to debate the facts in this case, since they amply support the District Court's judgment. However, factual review, even of a disputed case such as this, would not appear to be among the "special and important reasons" which must appear to justify the writ requested. Rules of the Supreme Court, Rule 17. Because this case is unique, any decision involving only the facts would be of importance only to the litigants.

To justify further review of this case, the Petitioner argues that the findings are inadequate because of the District Court's "failure to make subsidiary findings of fact concerning substantial evidence of disparate treatment. . . ." (Petition, p. 12). However, it is crucial to note that the Petition does not identify any specific evidence or claims of disparity which are not covered by the findings. This was not an oversight, since the same contention was asserted in the Court of Appeals and rejected.

In fact, the findings deal adequately with all bases for a claim of disparity in treatment. The differing performance appraisals given to plaintiff and a co-worker are covered by Finding No. 8. With respect to plaintiff's claimed applications for other jobs, the District Court made findings either

that the persons hired were better qualified, that plaintiff was unqualified, or that there were no openings and no hiring. (Findings of Fact No. 10 and No. 11). With respect to the claim of disparate treatment in connection with a grievance procedure, which plaintiff claimed entitled her to outside arbitration, the District Court found that no such grievance procedure existed. (Finding of Fact No. 16).

There were other instances where plaintiff claimed to have been treated unfairly, although there was no evidence which would permit comparison to the treatment accorded to some other similarly situated person. The District Court's findings about plaintiff's employment history cover these instances of claimed unfairness, particularly Findings 6, 7, 9 and 12. In substance, the District Court found that plaintiff's poor performance was the cause of everything that occurred.

Petitioner lists seven items of evidence (Petition, pps. 8-9) which she asserts were not covered by findings. These evidentiary items, however, are only relevant to the issue of the supervisors' knowledge of plaintiff's Mexican-American origins. The evidence obviously was rejected, because the District Court found that the supervisors did not know she was Mexican-American.

In summary, it does not appear that there is any significant issue as to the adequacy of the findings in this case. However, even if some gap in the findings could be demonstrated after full briefing and review of the record, the prospect of a resolution of the question thereby raised would not appear to be a special or important reason which would justify the granting of the writ.

Petitioner also suggests that this case should be used to review an apparent conflict between the circuits regarding the standard of review in discrimination cases. In our view, this contention raises, at most, an abstract question. The

Memorandum opinion of the Ninth Circuit neither addresses this issue specifically and nor provides any basis for inferring that either approach to the question would have had any impact in this case. Thus, in sum, the Petition does not demonstrate that the resolution of that issue would make any difference in this case.

Finally, Petitioner raises an interesting legal argument regarding constructive notice. The District Court found that: "During her employment, no BART management employee, including her supervisors, was aware of her national origin." (Finding No. 2). Certain personnel records, however, reflected that she was Mexican-American, although there was no evidence adduced at trial which indicated that the supervisors knew the contents of those records. Petitioner argues that the supervisors should be charged with that knowledge constructively, under principles of agency law.

However, the argument ignores the fact that the key issue in a disparate treatment case such as this is the issue of intentional discrimination. Constructive knowledge would permit a finding of intent where none exists.

The fallacy of the argument is shown by considering the burdens of proof and production of evidence involved in a typical case. Assuming a prima facie case of discrimination is established the employer must come forward with evidence. The defendant must specify "some legitimate, nondiscriminatory reason" for the employment decision. *McDonnell Douglas Corp. v. Green,* (1973) 411 U.S. 792, 802. "To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Texas Dept. of Community Affairs v. Burdine,* (1981) 450 U.S. 248, 255. If the employer comes forward with such evidence, the plaintiff

has the opportunity to show that the proffered reasons for the employment decision were not the true reasons—that the asserted basis for the action was a pretext. The ultimate focus of this inquiry is whether "the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas Corp. v. Green,* (1973) 411 U.S. 792, 805.

At this point in the fact finder's analysis, motivation and intent become directly in issue, at least in the type of case which is at hand.[5] A pretext necessarily involves some kind of improper motive.

Evidence of disparate treatment is merely circumstantial evidence of discriminatory motive. Thus, for example, if it is shown that there was an inconsistent application of the articulated reason for the decision, and that the inconsistency is based on lines which suggest that race made a difference, an inference of improper motive may be drawn.

We submit that such an improper motive can never be inferred if the person whose state of mind is in issue was not aware, in fact, that the person allegedly discriminated against possessed the particular characteristic on which the claim of discrimination is founded. A person cannot be motivated by racial animus against another individual if that person does not know the race of that individual.

Thus, knowledge of plaintiff's ethnicity is important in this case only because the state of mind of the plaintiff's supervisor is important, and actual knowledge, not constructive knowledge, is the crucial element.

---

5. Of course, we distinguish other Title VII cases in which proof of discriminatory motive or intent is not required. Such cases are generally characterized as "disparate impact" or "present effects of past discrimination" cases. See Schlei & Grossman, *Employment Discrimination Law* (1976) p. 1158.

However interesting the argument over this question may be, there are no compelling reasons for its resolution by this Court. As the foregoing brief discussion demonstrates, the Petitioner's argument makes no sense, and it was properly rejected by the Court of Appeals.

Second, if the absence of any reported decisions on point is any indication, the issue is not important. Thus, it appears that in almost all cases involving intent and discriminatory conduct there is never a question of whether the aggrieved person is known to be a member of a protected class. The question of constructive knowledge is never in issue.

Finally, and most important, even if Petitioner prevails with her argument, it would not compel reversal of the District Court's judgment. Lack of knowledge of plaintiff's national origin was only one basis for the judgment. It went only to the claim of national origin discrimination. The other detailed findings go to both gender and national origin discrimination and support the judgment even without the challenged finding.

Thus, the argument, while interesting, does not create a special or compelling reason for reviewing this case.

CONCLUSION

Although Petitioner is obviously dissatisfied with the decisions of the courts below, it has not been demonstrated that there are any issues involved in the case which merit the attention of this Court. The case is one which was determined by its facts. The facts found by the District Court have been fully articulated and reviewed by the Court of Appeals. Ms. Salazar has had her day in court.

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: January 19, 1982.

Respectfully submitted,

MALCOLM BARRETT,
General Counsel

THOMAS JACKSON
Associate General Counsel

JAMES W. ROSENQUIST
Attorney

By: JAMES W. ROSENQUIST
Attorneys for Respondent